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IN THE

Supreme Court of the United States

October Term, 1948

No. .....

RAILWAY EMPLOYES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ET AL., *Petitioners,*

v.

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*

PETITION AND SUPPORTING BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Now come your petitioners, the Railway Employes' Department of the American Federation of Labor; System Federation No. 7 of the Railway Employes' Department of the American Federation of Labor; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Maintenance of Way Employes; Clyde Brittan, President of said System Federation No. 7; George M. Harrison, President of the said Brotherhood of Railway and Steamship Clerks; E. R. Stapleton, General Chairman of the System Board of Adjustment of said Brotherhood of Railway and Steamship Clerks; J. P. Keys, General Chairman of said Brotherhood of Railway and Steamship Clerks on the property of the Northern Pacific Railroad, and respectfully pray that a

writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, entered herein on May 14, 1948, affirming the judgment of the District Court of the United States for the Northern District of Minnesota.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 685) is not yet reported. The opinion of the District Court (R. 653-665) is reported in 68 F. Supp. 492.

JURISDICTION

The judgment and decree of the Circuit Court of Appeals was entered on May 14, 1948 (R. 703). This judgment and decree was modified by the Circuit Court on July 12, 1948, to permit the payment of interest on the taxes paid by respondent (R. 710). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTION PRESENTED

The basic issue presented is what principles are controlling in determining whether individuals are employees of a railroad company within the meaning of the Carriers Taxing Act.[1]

More specifically, the question raised is whether, in a proceeding to determine tax liability under the Carriers Taxing Act, resolvable upon the question of whether an employment relationship (within the meaning of that Act) exists between a railroad company and individuals on the pay-roll of a contracting concern performing services for

[1] Act of June 29, 1937, c. 405, 50 Stat. 435, 26 U. S. C. Subchapter B of Chapter 9 et seq. (prior to codification in the Internal Revenue Code, cited as 45 U. S. C. § 261 et seq.)

the railroad on the railroad's premises, it is proper for a court to hold as not significant or controlling the inherent nature of the work involved and the evidentiary record of who exercises supervision and control over the employees —criteria which this Court has held to be essential in determining employment relationships under closely analogous circumstances.[2]

STATUTE INVOLVED

The pertinent provisions of the Carriers Taxing Act are set forth in the Appendix, *infra*.

STATEMENT

This suit was brought below for the refund of employment taxes paid by respondent herein under the Carriers Taxing Act for the years 1939 to 1945, inclusive. Respondent having adopted the practice of contracting out portions of its operations, a question was raised as to whether the individuals performing such work were employees of respondent or of the contractor within the meaning of the statute. Petitioners, representing the interest of the workers, were permitted to intervene as defendants below (R. 26).

Respondent is a common carrier by railroad, subject to Part I of the Interstate Commerce Act (R. 666). In the operation of its transcontinental system, it maintains various facilities for the handling of freight and the servicing of equipment and personnel, including an ore dock at Superior, Wisconsin, where iron ore is unloaded from railroad cars and loaded into lake vessels; sand houses, coal docks and cinder pits for the refueling and servicing of locomotives; boarding camps for the feeding and lodging of rail-

[2] *Bartels* v. *Birmingham*, 332 U. S. 126; *United States* v. *Silk*, 331 U. S. 704; *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722.

road crews; stations for the icing of refrigerator cars; and yards at which freight cars used for hauling cattle are cleaned and washed before being returned for use.

For many years, including and antedating the taxable period, operation of the aforedescribed facilities was handled by the Addison Miller Company through contracts with respondent (R. 668).[3] Since it is well established by decisions of this Court that what is important is what is actually done under contracts rather than what the contracts in terms provide, we shall not unnecessarily extend the discussion of this petition by enumerating the several contractual provisions (R. 71-76; 77-80; 83-85; 127-133; 138-142; 146-151), but will briefly summarize in a subsequent section of this petition the facts of railroad supervision and control as disclosed by the record.

Subsequent to the inauguration of contractual arrangements between respondent railroad and Addison Miller Company, hereafter sometimes called the contractor, a number of statutes were passed regulating the relations of railroads and their employees, notably the Railway Labor Act, the Railroad Retirement Act, the Carriers Taxing Act, and the Railroad Unemployment Insurance Act. Without significant exception these statutes have defined a railroad employee as one subject to the continuing authority of the railroad to supervise and direct the manner of the rendition of his services. The Carriers Taxing Act, with which we are here primarily concerned, contains the following definitions:

> The term "employee" means any person in the service of one or more employers for compensation . . .[4]
>
> An individual is in the service of an employer . . . if he is subject to the continuing authority of the em-

[3] Certain of the boarding camp operations have been performed through another contractor, the A. W. Partridge Company. Since these operations by the Partridge Company are substantially identical with those of the Addison Miller Company, separate discussion of the former company is unnecessary.

[4] 50 Stat. 435, 26 U. S. C. Sec. 1532 (b).

ployer to supervise and direct the manner of rendition of his service, which service he renders for compensation.[5]

After the passage of these statutes, some question arose as to their applicability to employees on the payroll of the contractor but working on the premises of respondent railroad, and the Bureau of Internal Revenue undertook an investigation to determine possible liability of respondent for taxes under the Carriers Taxing Act. Upon consideration of the relationship of the parties and the character of work performed, the Bureau determined that despite the fact that the workers had been hired and compensated by the contractor, they were nevertheless employees of the respondent within the meaning of the Carriers Taxing Act since they were subject to respondent's continuing authority to supervise and direct the manner in which the work was performed (R. 668-669). As a result of this ruling, taxes for the years in suit were assessed, thereafter paid, and action instituted by respondent to recover the amount thereof (R. 669-670).

The case was heard by the United States District Court for the District of Minnesota, Third Division. Extensive evidence was produced, as the size of the record indicates. That offered by the Government and the intervening labor organizations, petitioners herein, tended to show a definite degree of integration of the contract operations with the business of respondent, and the existence and actual exercise by respondent of authority and supervision over the work of the individual employees.

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[5] 50 Stat. 435, 26 U. S. C. Sec. 1532 (d). Substantially identical language is contained in the Railroad Retirement Act, 50 Stat. 307, 45 U. S. C. § 228a (c), and the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C. § 351 (e). The Railway Labor Act, which was the first of these statutes to be enacted in point of time, refers to the employers covered by it as "carriers", and defines an employee as including "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service"). 44 Stat. 577, 45 U. S. C. § 151 Fifth.

The trial court refused, however, to consider this evidence, ruling that the question in issue was essentially one of statutory construction. It held that as the statute provided for a tax on wages, and as the actual payment of wages had been made by the contractor (admittedly not an employer under the Carriers Taxing Act), there could be no liability on the part of the railroad company. Hence the trial court deemed it unnecessary, and expressly declined, to make any findings with respect to the amount of continuing authority exercised by the railroad over the workers, and directed judgment for the railroad (R. 653-665), *Northern Pacific Railroad Company* v. *Reynolds*, 68 F. Supp. 492.

An appeal was taken to the Circuit Court of Appeals for the Eighth Circuit by the Government and the intervenors. The Circuit Court of Appeals declined to follow the reasoning of the District Court, but on its own consideration of the record concluded that the employees in question were not employees of respondent within the meaning of the Carriers Taxing Act. In its opinion (R. 685-702), the Court emphasized the following factors which it considered as controlling:

1. It pointed out that the contractor was a going concern in its own right not subject to financial control by respondent;

2. It called attention to an alleged inconsistency in the position of the Government in that the Wage and Hour Administrator had ruled that the same employees were not railroad employees within the meaning of the Fair Labor Standards Act;

3. It relied upon an amendment made by Congress in 1946 to the definition of "service" in the Carriers Taxing Act, which the court described as bringing the statute into harmony with the position advanced before it by the Gov-

ernment and intervenors, but which the court denied was a clarifying amendment.

4. It concluded that the Internal Revenue Commissioner's ruling was based on the close functional connection between the contract work and respondent's own operations, and held that the existence of such a connection was not controlling nor of particular significance;

5. It refused to consider as significant extensive evidence that the work performed under the contracts was inseparably interwoven as a matter of inherent necessity with the railroad's own functions, as well as extensive evidence of resulting actual supervision and direction of the contract workers by respondent.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold as essential or significant the facts of the "total situation" as disclosed by the record, including the economic realities of the work involved and the demonstration of actual railroad supervision and control;

2. In failing to apply correctly the statutory definition of the terms "employee" and "service", or to apply criteria for the determination of the employment relationship established by this Court as essential;

3. In holding that Congressional amendment to the Carriers Taxing Act in 1946 worked a change in the law and was not a clarification of its previous definition;

4. In failing to remand the case to the trial court for findings of fact on the evidentiary issue of supervision and control by the railroad, once it determined the sole basis of the trial court's judgment to be in error;

5. In holding that the evidence produced before the trial court did not show actual supervision and control by respondent;

6. In holding as significant to the problem presented an alleged inconsistency between the acts of the Wage and Hour Administrator and the Commissioner of Internal Revenue with respect to the employees involved;

7. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Circuit Court of Appeals Determines an Important Question Under the Carriers Taxing Act Which Has Not Been, But Should Be, Decided by This Court.

The Railroad Retirement system of laws applies to approximately one million employees and their dependents. The rights of these persons to the annuities and other benefits available under this statutory system depend upon the existence of a "service" relationship between the employees and the railroad employers, within the meaning of governing statutes. Their rights to unemployment compensation depend upon identical provisions of the Railroad Unemployment Insurance Act (45 U. S. C. Sec. 351). Their collective bargaining rights are established and governed by the Railway Labor Act wherein substantially the same definitive expressions are to be found (45 U. S. C. Sec. 151 Fifth). All of these statutes are available to those in the "service" of railroad employers as that term is defined in the various acts. Those to whom these statutes are not applicable may, under proper circumstances, resort to other acts such as the National Labor Relations Act, the Fair Labor Standards Act, and the Social Security Act for a determination of their rights in various situations. Thus, the distinction between the special group of railroad stat-

utes and the more general acts depends upon the existence of a service relationship within the meaning of the railroad group.[6]

It became apparent, immediately upon the institution of the present suit in the trial court, that not only the tax liability of respondent under the Carriers Taxing Act would be determined, but also the right of the employees involved to participate in the social benefits of the Railroad Retirement Act, the Railway Labor Act, and other applicable railroad statutes. It is, therefore, of the highest importance, from the point of view of proper administration of both the special legislation applicable to railroad employees and the more general group of laws applicable to other employees, that the line of demarcation between the two be fixed authoritatively by the highest court. This Court has never had occasion to pass upon this precise question in any previous case.

As decisions of this Court demonstrate, in connection with problems under other social statutes closely comparable to the problem here presented, there is probably no relationship between persons in our modern society more often encountered or more difficult for the law to identify than that of employer and employee. The ease with which appearance may be made to differ from fact in designating the true employer-employee relationship has been significantly noted by this Court.[7]

The present case is illustrative of such difficulties. Three parties are involved. Respondent, Northern Pacific Railway Company, is a common carrier by railroad and is

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[6] It is well recognized that the Carriers Taxing Act is not a mere revenue measure but is an integral part of a statutory plan to provide retirement annuities for railroad workers. *State of California* v. *Anglim*, 129 F. 2d 455, 458 (C. C. A. 9th); *Wabash R. R. Co.* v. *Finnegan*, 67 F. Supp. 94, 98-99 (E. D. Mo.).

[7] For example, see *United States* v. *Silk*, 331 U. S. 704, 716, wherein this Court reversed a factual finding concurred in by both the District Court and Circuit Court of Appeals based upon inferences drawn by these courts from facts concerning which there was no real dispute.

admittedly an employer within the meaning of the Carriers Taxing Act and the Railroad Retirement Act. It has entered into a series of contracts with the Addison Miller Company, ostensibly calling for the performance by that company of certain functions which are necessary to the continued operation of respondent's business, the performance of which must be, and is, inseparably interwoven as a matter of inherent necessity with respondent's own operations.[8]

The Addison Miller Company, as a company, is financially independent of the railroad and is a going concern in its own right. It is not disputed in this case that this company is not an employer subject to the Carriers Taxing Act or the Railroad Retirement Act. The employees involved have been on the payroll of the contractor, and it is primarily on account of these facts that respondent has contended throughout this case that they are employees of the contractor and not of the railroad within the meaning of the Carriers Taxing Act.

On the other hand, the Carriers Taxing Act provides that persons are to be considered as employees if in the "service" of an employer, and an individual is considered in the service of an employer "if he is subject to the con-

[8] When an employer introduces the intermediary agency of an alleged contractor between itself and those who perform the routine day to day services on which it depends for the efficient conduct of its business, complications, uncertainties, and contradictions necessarily result. Such arrangement attempts to separate artificially functions which are intrinsically inseparable. Though contracts be ever so artfully drawn, and though a division of supervisory authority of employees as between principal and contractor be ever so carefully sought, the realities of economic necessity will ultimately demonstrate the superficial character and falsity of the arrangement. The economic undercurrents necessarily present, if detected, will unerringly point to the party having the real authority of direction and supervision. But, as this Court has recognized in recent decisions later to be discussed herein, the judiciary must be diligent to detect these undercurrents lest its stamp of authenticity be given to a sham. With all due respect to the Circuit Court of Appeals for the Eighth Circuit, we submit that it was deceived by the situation here presented, largely, because it chose to regard as controlling factors quite apart from the economic realities of the situation and declined to give controlling weight to other factors which reflect the true economic realities.

tinuing authority of the employer to supervise and direct the manner of rendition of his service".

It is and has been the position of petitioners that the facts disclosed in this record clearly establish that the foregoing requisite service relationship does not exist as between the employees and the contractor but does exist between the employees and respondent.

2. The Circuit Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of this Court.

In *Bartels* v. *Birmingham,* 332 U. S. 126, this Court held that the relationship of employer-employee to determine liability for employment taxes under the Social Security Act was not to be decided solely by the concept of control which an employer may or may not exercise over the details of the service rendered to his business by the workers, and that accordingly the terms of a contract cannot be the sole criteria of the employment relationship. In reaching this conclusion this Court observed (p. 130):

> Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.

In *United States* v. *Silk,* 331 U. S. 704, relied upon in the *Bartels* decision, this Court made it quite clear that judicial determination of an employer-employee relationship involving social legislation was not to be restricted by "the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants . . . often referred to as power of control, whether exercised or not, over the manner of performing services to the industry'" (p. 713). It was further pointed out that while it is probably impossible to extract from the Social Security Act a rule of thumb to define the

limits of the employer-employee relationship, the courts "will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of the relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." (p. 716).

In *Rutherford Food Corporation* v. *McComb,* 331 U. S. 722, this Court held (p. 729) that "where the work done, in its essence, follows the usual path of an employee, puting on an 'independent contractor' label does not take the worker from the protection of the Act [citing cases]." Consistent with its holding in the *Silk* and *Hearst*[9] cases, the Court viewed determination of the employer-employee relationship as not dependent on "isolated factors but rather upon the circumstances of the whole activity" (p. 730). In deciding that the work of "boners" in a slaughter house was really "a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment" (p. 729), the Court considered among other indicia as compelling evidence against the asserted independent contract arrangement the fact that "the premises and equipment of Kaiser were used for the work, . . . the managing official of the plant kept close touch on the operation", and "while profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." (p. 730).

We have emphasized the particular observations of this Court in the detail above indulged because we consider it of prime importance in this petition to demonstrate how the Circuit Court of Appeals failed to give proper consideration to criteria essential to a determination of the employer-employee relationship as established by the fore-

[9] *Labor Board* v. *Hearst Publications,* 322 U. S. 111.

going decisions.[10] Although the Circuit Court purports in its opinion to have given consideration to the "total situation" and to have followed this Court's decisions in doing so, analysis of its opinion, particularly in the light of the evidentiary record, plainly discloses that the Circuit Court's recognition of established principles is only superficial.[11]

We make this observation for the following reasons: First, we understand it to be implicit from the foregoing decisions that a careful and complete analysis of the record is requisite before the several criteria regarded by this Court as embracing the "circumstances of the whole activity" can be properly appraised and evaluated. This we submit the Circuit Court of Appeals did not do. Instead of adopting the approach consistently followed by the lower federal courts in determining questions of this character, the Circuit Court of Appeals here made scant reference to the evidence of "degrees of control exercised", "the investment in facilities", the "permanency of relation and skill required in the claimed independent operation", and the "opportunities for profit and loss".

[10] We adopt the premise that the application of provisions of the Carriers Taxing Act, because of the intimate relation of that Act to the social purposes of the Railroad Retirement Act and other railroad legislation, should follow the same rule of law with respect to employer-employee relationships that was applied by this Court to the Social Security Act in the *Silk* and *Rutherford* cases and to the National Labor Relations Act in the *Hearst* case.

[11] For example, the Circuit Court repeatedly emphasizes in its opinion the fact that the contractors are not financially controlled by respondent and that they maintain business establishments separate from those of the railroad. We freely concede that these facts are relevant to the question under consideration. But we view such facts as only partial indicia of the status of the employees concerned. The Circuit Court, however, seems to have attributed to them almost compelling force. Under such an evaluation, any carrier would be free to enter into any contract for the performance of any type of work, preserve control over the details of the work itself, and still divest itself of the responsibilities of an employer under the Carriers Taxing Act and related statutes, once it was established that the contractor was a separate entity. We cannot believe that statutes such as those here involved were intended to permit any such easy avenue of evasion. *Cf. Despatch Shops* v. *Railroad Retirement Board*, 153 F. 2d 644, 646 (App. D. C.); *Despatch Shops* v. *Railroad Retirement Board*, 154 F. 2d 417, 419 (C. C. A. 2d); *Wabash R. R. Co.* v. *Finnegan*, 67 F. Supp. 94, 99 (E. D. Mo.).

Instead, the Circuit Court placed its emphasis elsewhere, and considered of controlling significance, apparently irrespective of what the evidence on the foregoing items of consideration might show, the fact that the contractor had the dignity and status of an actual business enterprise, that the Administrator of the Wage and Hour Division had adopted a position inconsistent with that advanced by the Internal Revenue Collector in this case, and that the Commissioner's action had been erroneously motivated by consideration of the functional characters of the work involved plus the fact that it was performed on railroad property. In short, the court has placed to one side as not of particular significance the very items which this Court has held to be essential in judicial determinations of employment relationships, and has substituted for such criteria other items of consideration which it felt were entitled to controlling weight. In doing so, the court obviously did not appraise the "circumstances of the whole activity".

In the second place, the Circuit Court of Appeals did not even evaluate the factor of control and supervision which in this case, unlike those in which this Court has considered the Social Security legislation, was the subject of specific definition in the applicable statute for determination of the employment relationship. While it is true that this Court has rejected the notion that the common law concept of control is sufficient as a means of determining the employment relationship under social legislation, nevertheless, this concept has been clearly recognized as one of the essential elements which should be adequately considered in reaching a decision. Particularly is this so where, as here, the statute expressly provides that "an individual is in the service of an employer (carrier) whether his service is rendered within or without the United States *if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service,*

which service he renders for compensation . . .'' (Emphasis supplied).[12]

Accordingly, the ultimate question to be decided in this particular litigation is the existence of continuing authority of supervision and direction by the carrier over the employees on the payroll of the contractor, as required by the statutory definition of an ''employee''. For this reason the Government and the intervenors below introduced testimony of a number of employees and of a former general manager of the contractor, showing conclusively that the authority to supervise operations was left to the resident officials of the railroad, an authority which they did not hesitate to exercise (R. 367, 373, 387-8, 401-3, 407-9, 461, 469, 488, 514-5, 529, 588, 612, 635, 301-2, 307, 372, 413, 415, 417, 419, 422, 430).

The evidence introduced at the trial further showed that the railroad's control permeated every phase of the work, including the hiring (R. 380, 625) and firing (R. 489, 490, 505-6, 625) of help, the fixing of hours of work (R. 365, 391, 420, 437-8), and the establishment of wage scales (R. 631-3).[13] There was also evidence that the control exercised by the contractor was desultory and sporadic (R. 368, 384, 407, 479, 548).

The contractor had no substantial investment in the facilities of the operations since, with minor exceptions, all machinery, equipment, and supplies were furnished by respondent on its premises (R. 385, 440, 470, 485, 515, 529, 613, 406, 479, 516, 297, 206).[14]

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[12] 26 U. S. C. Sec. 1532 (d).

[13] In short, as observed by the Circuit Court of Appeals for the Fifth Circuit in *Fahs* v. *Tree-Gold Co-op Growers of Florida*, 166 F. 2d 40, 44, "The degree of control exercised by the taxpayer was substantially the same as would be expected if the contractors had been admitted employees, paid by the piece."

[14] Respondent extended its activities in this regard to the point of furnishing the contractor with railroad telephones, telegraph, and mail (R. 371, 385, 440, 457, 471, 490, 517, 532, 616) and even furnished living quarters to employees on the contractor's payroll at no cost to them or the contractor (R. 412, 521, 627).

Assertions were made at the trial that the Addison Miller Company was an independent contractor by reason of its expertness in the fields covered by the contracts. Repeated questioning however, elicited no information as to any skill on the part of that company as to the coaling of railroad locomotives, the operation of a huge ore dock, or the icing or cleaning of railroad cars. The only skill assertedly established was an alleged proficiency in the procuring and handling of low cost common labor. Less charitably stated, this signifies a hired exploiter of employees. Actually, this was the function performed by the contractor. The record cites instances of employees on the contractor's payroll required to work 365 days per year (R. 390, 392, 404, 455-6) and to be on call 24 hours a day (R. 437-8, 456, 463) for wages from $60 to $75 per month (R. 392, 404, 455-6). Some of the men so paid ate and slept on the job (R. 411-2, 463, 628). When the war introduced a new element of competitive bidding for individual workers, and when certain of your petitioners were able to organize the employees on the contractor's payroll and bargain collectively for them, the "expertness" promptly disappeared. In short, with the disappearance of the labor cost differential resulting from its employment practices, the contracts were promptly cancelled and the railroad took over the work itself.[15]

The opportunities for profit and loss were negligible. The contract price was either fixed on a cost-plus basis, or if on a unit basis, was subject to fluctuation from time to time in such a manner that the contractor never faced any chance of loss (R. 154-5, 629, 201, 160).

We cannot within the scope of this petition discuss in greater detail the facts of the case as revealed in the record. The foregoing record references are designed to illustrate several points which we feel are of particular importance to the grant of certiorari:

[15] All of the contracts involved, with the exception of the boarding contracts, were cancelled prior to the institution of this suit, and the work since that time has been performed by respondent.

First, the references to the record concern subject-matter which this Court has specifically singled out as factors which should enter into judicial determination of employer-employee relationships.

Second, the items of evidence on which record annotations are provided are factors which the Circuit Court of Appeals thought of so little significance that they were given scant consideration in its opinion, despite the fact that the trial court made no findings with respect to such factors.[16] Such evidence of this type as was discussed in the Circuit Court's opinion, was brushed aside as representative only of isolated instances which need not be considered in relation to the general picture. Reference to the record conclusively refutes this conclusion. It is difficult for petitioners to understand how the statutory definition of an employee can be met except through the introduction in evidence of practical examples such as those afforded by the record, and how judicial judgment may be reached without complete analysis and evaluation of such evidence. For this reason, we submit that the actual, if not admitted, rejection of this evidence was patently erroneous.

Third, these record references illustrate the utter lack of realism inherent in an opinion which seeks to decide a case of this character without careful consideration and evaluation of the entire record of facts and circumstances. This lack of realism is pointedly demonstrated by the Circuit Court's rejection of the degree of integration of contract services into respondent's business as a "premise" without particular relevance or significance. In its opinion (R. 685) the Circuit Court states:

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[16] Although requested by the Government to return the case to the trial court for findings on the question of supervision and control, the Circuit Court declined to do so, stating (R. 702): "We have indicated that, on all the considerations involved, the record in our opinion would not permit of a holding that all the workers generally or as classes were entitled to be regarded as employees of the Railway Co. prior to the 1946 amendment of the statute. This is sufficient to require affirmance of the judgment without regard to the basis on which the trial court's decision rested."

Compare *McComb* v. *McCay*, 164 F. 2d 40 (C. C. A. 8th).

> Only by adopting the premise that the functional aspect and integral relationship of the services to railroad operations were such that the railroad could not possibly have surrendered vital control and direction would it be at all possible to conclude on the record before us that the workers were subject to the continuing authority of the employer to supervise and direct, in a manner and to the extent necessary to regard them as railroad employees under the statute. But that broad and abstract premise is not warranted by the history of the contracting enterprises, the long recognized economic relationships involved, and the language of the statute in the light of the 1946 amendment and its purpose.[17]

We submit that the evidence of continuing authority to supervise and direct contained in the record is susceptible of no other interpretation than that such authority was vested in and exercised by the railroad. And it is precisely because the services involved were so intimately interwoven with the operations of the railroad that this is so. Accordingly, the court's rejection of the premise of functional integration as an element entitled to material consideration is, we submit, demonstrably erroneous, particularly where the rejection is accompanied by no evaluation of evidence purporting to overcome what, at the least, is a presumptive indication of continuing railroad authority.

3. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeals on Substantially the Same Problem.

In the following decisions the Circuit Court of Appeals for the Third, Fourth, Fifth, and Sixth circuits have approached the problem here presented, although not under

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[17] Compare *Wabash R. R. Co.* v. *Finnegan*, 67 F. Supp. 94 (E. D. Mo.), wherein the court, in considering under the Carriers Taxing Act an almost identical situation to that presented here, observed (p. 100): "The nature of the services to be performed was such that plaintiff could not surrender control and supervision in fact, even if it did so in words."

the Carriers Taxing Act, in a manner consistent with this Court's decisions in the cases cited in the preceding section, but not in harmony with the approach taken by the Circuit Court of Appeals for the Eighth Circuit:

Schwing v. *United States* and *Wanamaker* v. *United States*, 165 F. 2d 518 (C. C. A. 3d)
United States v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4th)
Fahs v. *Tree-Gold Co-op Growers of Florida*, 166 F. 2d 40 (C. C. A. 5th)
Cimorelli v. *New York Central R. Co.*, 148 F. 2d 575 (C. C. A. 6th); *Pennsylvania R. Co.* v. *Roth*, 163 F. 2d 161 (C. C. A. 6th)

In only two cases, other than the instant case, have we been able to find judicial consideration of the precise problem here involved under the Carriers Taxing Act. Both are trial court decisions, but attention is invited to them because of the striking similarity to the facts here involved and because each of them adopts an approach contrary to that adopted by the Eighth Circuit.

In *Wabash R. R. Co.* v. *Finnegan*, 67 F. Supp. 94 (E. D. Mo.), the court had before it a series of contracts entered into between a railroad and a contractor under which the latter agreed to operate coal docks and sand houses, "watch" locomotives, transfer freight, and clean stock cars. The workers were hired and compensated by the contractor, and the claim was advanced that the contractor was the employer of the workers for federal employment tax purposes. The court rejected this contention, holding (p. 99):

> Approaching the relationship between plaintiff and the workmen involved, in light of the purpose of the Carriers Taxing Act, a prime consideration in determining if the workmen in question were subject to the continuing authority of the plaintiff to supervise and direct the manner of performance of service is the nature of the services which were performed. Were they of a character plaintiff could delegate and place beyond its control and still claim to operate its railroad and

its carrier activities? The services were performed on plaintiff's premises, with the workmen under no restrictions as to where they could go on plaintiff's premises. Plaintiff furnished them with passes, and they used plaintiff's mail and telegraph service. All tools, machinery, and appliances belonged to the plaintiff. Some of the appliances such as coal chutes, motors, and sand elevators were expensive equipment, requiring care in operation and maintenance. If the contractor possessed any equipment to carry on the services contracted for, such does not appear in the record. The contractor furnished nothing but workmen. Some of the contracts called only for "workmen" to be furnished to perform certain kinds of services. Services called for, with but minor exceptions, related to operations integrated with the necessary business of plaintiff as a carrier and without which it could not operate as a carrier. The services were a functional part of plaintiff's business as a carrier. Unless the services were performed efficiently, plaintiff could not operate efficiently. . . . If plaintiff can shed itself of its responsibility under the Carriers Taxing Act for employees who perform services of the character covered by the contracts offered in this case, on the theory that the services are being performed by an independent contractor, the purpose of Congress in passing the Act can well nigh be destroyed.[18]

This decision, while not having the dignity of a circuit court opinion, at least has the virtue of a realistic approach to a problem which obviously requires careful evaluation of the evidentiary facts for its solution. Its approach to the problem is completely consistent with the approach signified by this Court in decisions previously discussed. It is completely irreconcilable with the approach of the Eighth Circuit in the instant case.

[18] In this connection the court relied on *Despatch Shops* v. *Railroad Retirement Board*, 153 F. 2d 644, 646 (Appeals D. C.) wherein the court stated: "It is conceivable that everything from maintenance-of-way through engineering or bookkeeping might be done by so-called 'independent' corporations. The application of this Act and of the other Acts passed for similar purposes and embodying the same language could be so severely limited as to render them of little worth in achieving purposes for which they were passed."

The second lower court decision, *Pennsylvania Railroad Company* v. *United States,* 70 F. Supp. 595 (Ct. of Claims) reaches a contrary result from the case just discussed, but it does so only after a careful analysis of the facts of record and an evaluation of these facts as not showing supervision and control requisite to denote the workers as employees of the railroad. In short, it applies the statutory definition to the facts of supervision and control, and reaches the conclusion (p. 602) that the individuals, who performed the services and were paid by the contractor, were in every sense "subject to the direction of that corporation as employer in the supervision and direction of the services rendered, as explained in detail in our findings". In reaching this conclusion the Court of Claims held (p. 603) that the work performed required special knowledge and skill which was furnished through the contractor's organization and direction, and that the individuals performing the work looked to their immediate superiors for supervision and direction and not to plaintiff for orders in carrying out the work.[19]

Significantly, no such conclusions as the foregoing are contained in the Circuit Court's opinion in this case, for the very good reason that the evidence simply will not substantiate such findings.

And so we find the Circuit Court completely deviating from the traditional approach to this problem taken by all other courts without exception, and emerging with an entirely novel basis for concluding that the employees involved are not in the "service" of the railroad.

First, the court relies on an alleged inconsistency which it claims to have found as between the acts of the Wage and Hour Administrator and those of the Commissioner of Internal Revenue. This is clearly insufficient to establish

[19] The court pointed out (p. 603) that at no time did the railroad undertake to exercise any authority in directing the manner in which the services should be performed.

that the carrier is not liable under the Carriers Taxing Act. If the court's argument is sound, then it would appear that the first government agency to pass upon any relationship among private parties renders a conclusive decision which must not be departed from by any other agency and which is binding on the courts. The fallacy of such reasoning is readily apparent, and we think it self-evident that this Court would not sanction a decision to stand which deprives individual employees of their rights under the railroad retirement system as a means of penalizing government agencies for alleged inconsistency in their rulings. In any event, other circuit courts of appeals have not seen fit to adopt such an extreme position. *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (C. C. A. 6th);[20] *Greenberg* v. *Arsenal Bldg. Corp.*, 144 F. 2d 292 (C. C. A. 2d) aff'd on other grounds 324 U. S. 697.[21] In these decisions it is recognized that the definition of "employer" in the Fair Labor Standards Act includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."[22] In short, cases may arise where an employee may have an employer who is intermediate between him and another person to whom he may also stand in an employment relationship, and in such instances the foregoing decisions recognize the right of the Wage and Hour Administrator to proceed against either or both of the employers. Therefore, even if it be assumed that the criteria of employment established by the Carriers Taxing Act are the same as those under the Fair Labor Standards Act, the ruling of the Commissioner of Internal Revenue in the present case would not necessarily be in

[20] Wherein workers were held to be within the coverage of the Fair Labor Standards Act (as employees of the radio company) although they were also subject to the Carriers Taxing Act (as employees of the railroad which controlled the radio company).

[21] See also *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.).

[22] 52 Stat. 1060 § 3 (d), 29 U. S. C. § 203.

conflict with that of the Wage and Hour Administrator since the latter did not determine that the railroad was not also an employer.

4. The Circuit Court of Appeals Erroneously Construes the Effect of the 1946 Amendment to the Carriers Taxing Act.

Throughout its opinion the Circuit Court gives compelling force to its interpretation of the amendment which Congress made in 1946 to the definition of "service" contained in the Carriers Taxing Act.[23] By this amendment the previously existing language of the "service" definition was changed to read in pertinent part as follows:

> An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation . . .

The Circuit Court states that the amendatory language was intended to bring the statute into harmony with the position which the Commissioner "was assuming to take" on the contracts here involved. The court then goes on to state that "Congress did not, however, make the amendment as a clarification of its previous definition, but only as an extension of scope of the Act for future application." (R. 696). In support of such conclusion the court, instead of referring to the legislative history which states the purpose of the amendment, refers rather to the effective clause of the amendment which states that the defini-

[23] 60 Stat. 722, 26 U. S. C. § 1532 (d) (Supp. 1947).

tion shall be effective only with respect to services rendered after December 31, 1946.[24] Whereupon, the court gratuitously assumes that Congress "did not therefore purport to lend sanction to any previous action of the Commissioner which was based upon the fact of the contract services having been performed on railroad property and having been integrated into the railroad's operations." (R. 696).

The legislative history accompanying the passage of the foregoing definition, however, completely refutes the deduction of the Circuit Court that Congress did not purport to lend sanction to any previous action of the Commissioner based upon the factor of integration and performance of services on railroad property. In its supplemental report accompanying the bill which contained the amendment in question, the Senate Committee on Interstate Commerce stated the purpose of the amendment as follows:

> The test of whether an individual is an employee, under present law, *depends on whether the employer has the authority to supervise and direct the manner of rendition of the services* . . .
>
> A second problem which has arisen under the present definition of "employee" is that employers have on many occasions made contracts with individuals *which purport not to be contracts of employment but under which the individual is for all practical purposes an employee and not an independent contractor.* These persons normally perform personal services *which are integrated into the employer's operations* and generally of such character that if the contractor engaged personnel to do the work rather than performing it personally, he would be himself an employer as defined in this bill. The language on page 8,

[24] We, of course, do not contend that the amendment should be applied retroactively. We do contend, however, that the amendment did not seek to change the law but merely to clarify what already was recognized to be a realistic interpretation of the previously existing language, as the legislative history about to be discussed will show.

line 18 to 25,[25] is calculated to *clarify the status* of such persons as employees.[26] (Emphasis supplied.)

It is accordingly quite clear, contrary to the court's deductions which were apparently unaided by this legislative history, that Congress was clarifying what it felt already was a realistic interpretation of the previous language of the definition.

Under such circumstances, petitioners' effort to persuade the Circuit Court that the functional connection between the contract work and the business of the railroad was a significant factor affording strong presumptive evidence of control of the work by respondent as a matter of economic reality and necessity certainly deserves a fairer characterization by the court than an effort "to outwit Congress".

[25] Which language, with a minor exception not here important, is the language previously quoted from the 1946 amendment to the definition of "service".

[26] Senate Rep. 1710, Pt. 2, p. 6, 79th Cong. 2d Sess.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

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August 14, 1948.

APPENDIX

CARRIERS TAXING ACT OF 1937, c. 405 50 STAT. 435, 26 U. S. C. Subchapter B of Chapter 9 et seq.*

Section 1. *Definitions:*

(b) *Employee.* "The term 'employee' means any person in the service of one or more employers for compensation . . ."

[26 U. S. C. § 1532 (b)]

(d) *Service.* "An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation . . ."

[26 U. S. C. § 1532 (d)]

(d) *Service.* [As amended by the Act of July 31, 1946, c. 709, Section 1, 60 Stat. 722] "An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation . . ."

[26 U. S. C. § 1532 (d) (Supp. 1947)]

Section 2, 50 Stat. 437, *Rate of tax.*

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month . . ."

[26 U. S. C. § 1500]

Deduction of tax from compensation.

(a) *Requirement.* "The tax imposed by section 2 (a) [26 U. S. C. § 1500] shall be collected by the

* Prior to codification in the Internal Revenue Code cited as 45 U. S. C. § 261 et seq.

employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid . . ."

[26 U. S. C. § 1501]

Section 3 (a), 50 Stat. 437, *Rate of tax.*

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936 . . ."

[26 U. S. C. § 1520]